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No. 06-1140

IN THE

Supreme Court of the United States

BONNIE WITTENBURG,

Petitioner,

v.

AMERICAN EXPRESS FINANCIAL ADVISORS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

Across the nation, movants for summary judgment in employment discrimination cases cite this Court's 1986 trilogy[1] as boilerplate in their briefs. Often unread and poorly understood, the trilogy did not reverse or modify other cases such as *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), and *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). "Trial by deposition," like "[t]rial by affidavit," is "no substitute for trial by jury which so long has been the hallmark of 'even-handed justice.'" Justice White's opinion echoed this tenet in *Anderson*. A court should act "with caution" in granting summary judgment and should deny summary judgment "in a case where there is reason to believe that the better course would be to proceed to a full trial." *Anderson*, 477 U.S. at 255. Plus, the "judge's function is not himself to weigh the evidence and determine the truth of the matter, . . ." *Id.* at 249.

Even so, there were early warnings. Dissenting, Justice Brennan feared that telling a trial court not to weigh evidence at summary judgment but to consider its "quantum" and "caliber" would lead to a "a full-blown paper trial on the merits." *Id.* at 266-67. Justice Scalia, then a judge on the District of Columbia Circuit panel that heard *Anderson* before it reached the Supreme Court, cautioned against changing "the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts," that would "effectively force the plaintiff to try his entire case in pretrial affidavits and depositions." *Anderson v. Liberty Lobby, Inc.*, 746 F.2d 1563, 1570 (D.C. Cir. 1984).

Precisely that problem has come to pass in employment discrimination cases in the Eighth Circuit and other federal courts which is cause for alarm.[2] Civil rights, unlike

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1. *Matushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

2. District courts in 2006 granted summary judgment in employment discrimination cases "[o]ver 70 percent" of the time. (Cont'd)

environmental protection and key aspects of antitrust, is not centered on government enforcement. Premised on private attorneys general asserting private rights of action, civil trials are its teeth. *Wittenburg* presents the major ways in which the system has gone awry. Rather than allay these concerns, the Respondent's Opposition Brief as addressed below has brought them into sharper focus.

I. Contrary to Respondent's Arguments, The Eighth Circuit Required Petitioner To Prove Pretext By A Preponderance Of the Evidence

Kohrt v. MidAmerican Energy Co., 364 F.3d 894, 897-98 (8th Cir. 2004), held that "in order to survive summary judgment, [plaintiff] must 'prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" Respondent claims that the Circuit did not actually *apply* that "unintended misstatement" as two paragraphs later it agreed with the district court "that Kohrt's ADEA claim did not survive judgment 'because the evidence [did] not *create a reasonable inference* that age was a determinative factor in the decision not rehire him.'" *See* Brf. in Opp. at 10. This argument fails because the quoted text does not address the proper evidentiary burden at summary judgment. Also, in the very next sentences, the Circuit restated its requirement that a plaintiff prove pretext in order to survive summary judgment:

> We hold that the district court properly granted summary judgment on the ADEA claim. The showing of pretext necessary to survive summary judgment "requires more than merely discrediting [MEC's] proffered reason for the adverse employment decision.

(Cont'd)

Joe Cecil and George Cort of the Federal Judicial Center, Memorandum to Hon. Baylson re: Estimates of Summary Judgment Activity in Fiscal Year 2006 (April 12, 2007). This study found "considerable variation across circuits and across districts within circuits." *See id.*

> [Kohrt] must also **prove** that the proffered reason was a pretext for age discrimination."

Kohrt, 364 F.3d at 898. *Kohrt* reflects the Circuit's confusion between the standards for summary judgment and a discrimination plaintiff's ultimate burden at trial.

The Circuit reiterated that a plaintiff must prove pretext by a preponderance in *Twymon v. Wells Fargo & Co.* 462 F.3d 925 (8th Cir. 2006), affirming summary judgment in a Title VII case. The Court of Appeals set forth the plaintiff's burden at the third step of the *McDonnell Douglas* burden-shifting framework: "Our consideration, then, is whether Twymon **proved by a preponderance of the evidence** that the stated reason for her termination was pretext." *Twymon*, 462 F.3d at 935. Respondent makes the novel argument that this Court should not take the Circuit at its words – even as they surface in progeny. *See e.g.*, *Wittenburg v. American Express Financial Advisors, Inc.*, No. 04-922, 2005 WL 3047785, *3 (D. Minn. Sept. 19, 2005) (citing *Kohrt*); *Yanda v. Mineta*, 2006 WL 1373155, *5 (D. Minn. May 15, 2006); *Murphy v. M.C. Lint, Inc.*, 440 F. Supp. 2d 990, 1014 (S.D. Iowa 2006) (quoting *Kohrt*); *McMannes v. United Rentals, Inc.*, 371 F. Supp. 2d 1019, 1031 (N.D. Iowa 2005) ("The showing of pretext necessary to survive summary judgment 'requires more than merely discrediting [United's] proffered reason for the adverse employment decision. [McMannes] must also **prove** that the proffered reason was a pretext for age discrimination.'"). Respondent likewise overlooks the Circuit's clear holding that Wittenburg had failed "to prove pretext" in her age and sex discrimination claims. *Wittenburg v. American Express Financial Advisors, Inc.*, 464 F.3d 831, 840-42 (8th Cir. 2006). The proof of pretext requirement undeniably equates to the impermissible preponderance of the evidence standard for summary judgment set forth in *Kohrt* and *Twymon*.

Respondent relies on the lone statement in *Wittenburg* that, "[a]ccordingly, our task is to determine whether a genuine issue of material fact remains whether AEFA's non-discriminatory

reason was pretextual." *See* Brf. in Opp. at 13. However, the Circuit affirmed not on account of Wittenburg's failure to raise a genuine issue of material fact relating to pretext, but because "Wittenburg ha[d] failed to prove pretext in her age discrimination claim." In addition, Respondent's reliance on that statement is flawed because the Circuit drew support from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973), whose proof paradigm describes the burdens required of plaintiffs at trial, not at summary judgment, which instead are addressed by the trilogy. The confusion between the burden at trial and at summary judgment is apparent and reflects the need for guidance by this Court.

II. Contrary To Respondent's Arguments, The Circuit Courts Differ On The Showing Necessary To Consider A Stray Remark As Relevant Evidence Of Discrimination

Respondent argues that all Circuit Courts require plaintiffs to establish a causal connection between a "stray remark" and the adverse employment action. *See* Brf. in Opp. at 13-14. In fact, the Circuits vary. *See generally*, Edward T. Ellis, *Evidentiary Issues in Employment Cases*, SK013 ALI-ABA 531 (2004) (stating that the Courts of Appeal "appear to differ on how connected a statement must be to the employment decision in order to avoid characterization of that statement as a stray remark"). The Eighth and Tenth Circuits compel plaintiffs to establish a causal connection between the discriminatory comment and the discharge in order for that comment to be considered evidence of discrimination. *See e.g.*, *Wittenburg*, 464 F.3d at 837; *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1140 (10th Cir. 2000) ("plaintiff must demonstrate a nexus exists between the allegedly discriminatory statement and the company's termination decision, . . ."). The Second and Third Circuits assess "stray remarks" under normal relevancy standards pursuant to Fed. R. Evid. 401-402 and permit a reasonable inference of discrimination to arise without forcing plaintiffs first to show a specific causal connection to the adverse

employment action. *See e.g.*, *Tomassi v. Insignia Financial Group, Inc.*, 478 F.3d 111, 115 (2d Cir. 2007); *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995).

The Second Circuit recently addressed the issue at summary judgment. *Tomassi*, 478 F.3d at 115. A court must consider the discriminatory remarks in conjunction with "all" of the evidence in the record viewed in the light most favorable to the plaintiff. *Id.*, 478 F.3d at 115. Critically, a court must not first categorize remarks as "stray" or "not stray" and then simply disregard the former, as was done in the instant case. *Id.*, 478 F.3d at 116. While stating that "the more remote and oblique the remarks are in relation to the employer's adverse action, the less they prove that the action was motivated by discrimination," the Second Circuit eschewed any requirement that a plaintiff first establish a causal connection between the remark and the discharge in order to consider the remark as evidence of discrimination. *Id.*, 478 F.3d at 115. The Circuit stated further that the relevance of remarks does not depend on their offensiveness, but "on their tendency to show that the decision-maker was motivated by assumptions or attitudes related to the protected class." *Tomassi*, 478 F.3d at 116. "Inoffensive remarks may strongly suggest that discrimination motivated a particular employment action." *Id.*[3]

Respondent's reliance on *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), for a causal connection between the remark and the job action is misplaced. This Court found that the potentially damning nature of age-related remarks could not be discounted on the ground that they "were not made in the direct context of [the plaintiff's] termination." *Reeves*,

3. The Eighth Circuit dismissed Ted Truscott's statement (when AEFA was preparing to reduce employees) that it was willing to hire and grow "*younger* portfolio managers and analysts," as it was nothing more than "a generalized statement" that did not evince "a discriminatory policy or practice" or "establish that age was the basis for Wittenburg's termination." While the statement may not be offensive, it nevertheless suggests favoritism of younger employees going forward. *See Tomassi*, 478 F.3d at 116.

530 U.S. at 151-153. Far from requiring proof of a causal connection, *Reeves* taught that a court cannot disregard an employer's discriminatory statement merely because it was not directly related to the adverse action.[4] *See id.*

The Eighth and Tenth Circuits' causal requirement exceeds Fed. R. Evid. 401 and 402 by placing a heightened burden on plaintiffs first to establish a nexus between the remark and the discharge before it can be considered as evidence of discrimination. In this case,[5] the application of the causal requirement unjustly denied Petitioner the opportunity to proceed with circumstantial evidence of a discriminatory corporate atmosphere and decision-maker bias. *See* Pet. for Cert., pp. 17-23.

III. The Eighth Circuit Failed To Review The Record As A Whole

Respondent argues that the Circuit properly evaluated all of the evidence at the pretext stage. In support, it quotes at length from the Eighth Circuit's opinion. Brf. in Opp. at 23-25. However, the cited text highlights the Court's erroneous analysis of Petitioner's pretext evidence.

For example, in rebutting Petitioner's evidence that the eight oldest analysts were terminated or resigned, the Circuit found that "of the 20 analysts evaluated Steve Schroll, age 46, and Paul Stocking, age 41, both members of the protected class,

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4. Similarly misplaced is Respondent's assertion of an intracircuit split in the Third Circuit regarding "stray remarks." Brf. In Opp. at 19-20. Neither case cited by Respondent is precedential. *See Windfelder v. May Department Stores Co.* 93 Fed.Appx. 351, 2004 WL 362292 (3d Cir. 2004); *Foster v. New Castle Area School Dist.*, 98 Fed.Appx. 85, 2004 WL 830878 (3d Cir. 2004). As a result, neither is binding on the Third Circuit or any district court. Third Circuit IOP 5.3 & 5.7.

5. The Circuit also dismissed the statement made by Head of Equities, Dan Rivera, that management during the make-over terminated Al Henderson, 62, as "part of a decision to retain those that were younger as younger employees have more years of service ahead of them." *Wittenburg*, 464 F.3d at 833, 837.

ranked 1st and 2nd respectively, in the 2002 analyst rankings." *See* Brf. In Opp. at 23. This finding is **false**. While Schroll and Stocking's names happen to appear first and second in the ratings list, the two highest ranked employees (G1/L2) were Mark Thompson, 26, and Henry Kaczmarek, 39, both outside of the protected class. SA-32; A-21-23.[6] Rather than refuting Petitioner's evidence of prejudice, the rankings support her claim that AEFA was biased against older employees and favored younger ones.

The Circuit also discounted Petitioner's evidence that her supervisor, Tom Mahowald, was aware of a possible third RIF in the two-year makeover plan because he sent an e-mail in 2002 stating that "[t]here is no second shoe to drop." Brf. in Opp. at 23. A juror could disagree based on an e-mail to Mahowald from Human Resources several weeks earlier that informed him of the possibility of another RIF in 2003. SA-30. Viewing the evidence in the light most favorable to Petitioner, including that there *was* a RIF in 2003, Mahowald's "second shoe" comment could be seen as nothing more than a manager's false and temporary assurance to the workforce during a time of corporate upheaval.

The Circuit further discounted Petitioner's evidence that an evaluation company, Starmine, had rated her highly which called into question Mahowald's G/4 rating. Brf. in Opp. at 24. Petitioner submits that a jury would find it incredible that Respondent contracted for this service, received the analyst ratings for 2002, and now asserts that those scores are completely irrelevant and/or do not accurately reflect the analysts' performance.[7] Respondent claims that the "G4 rating was based

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6. Petitioner submits that this is the type of mistake that a jury, which places multiple sets of eyes on a document, is unlikely to make.

7. An equal and opposite inference is that the Starmine rating system constituted the employment equivalent of a "second set of books" that management willfully ignored in order to discharge Wittenburg – plainly a matter of intent. *See McGraw v. Comm. of Internal Revenue*, 384 F.3d 965 (8th Cir. 2004). In the discrimination arena, intent is a

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on other factors in addition to the stock performance data evaluated by Starmine." Brf. in Opp. at 24. The statement is contrary to Respondent's earlier one that "Petitioner's performance, as with all analysts, was based *primarily* on an objective assessment of the performance of her stock picks and the funds on which she worked." Brf. in Opp. at 4.

Due to its weighing and culling of facts, the opinion contains inaccuracies, credibility determinations, and evidence viewed in favor of the Respondent. *See supra*, and Pet. for Cert., pp. 23-28 (*e.g.*, Circuit found as fact that Mahowald rated Petitioner a "G/3" where a document clearly showed he rated her a lower "G/4").[8] Space does not permit a side by side comparison of the differing evidence presented by the Petition and Brief in Opposition, but the Circuit's piecemeal approach to facts enables a summary judgment court to choose between the competing stories of the parties, traditionally a jury function. *See Knox v. State of Indiana*, 93 F.3d 1327, 1335 (7th Cir. 1996). Likewise, isolating pieces of evidence at summary judgment prevents a jury from drawing inferences between and among them. For instance, the Circuit simply adopted the trial judge's finding that "junior" referred to "band" rather than age. However, if the

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"pure question of fact . . . [i]t is not a question of law, and not a mixed question of law and fact." *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982).

8. The Eighth Circuit's erroneous summary judgment analysis in employment discrimination cases is recognized even within its bench. *See e.g. Arraleh v. County of Ramsey*, 461 F.3d 967, 980-981 (8th Cir. 2006) (dissent, J. Heaney) (noting majority's erroneous failure to take into account the impact of multiple racially biased remarks in employee's failure-to-hire claim); *Quick v. Wal-Mart Stores, Inc.*, 441 F.3d 606, 610 (8th Cir. 2006) (dissent, S. J. Donald Lay) ("Once again, our court is faced with an employment discrimination case where there are facts in dispute. Rather than submitting this conflict to a jury, the majority decides the facts as a matter of law. In my opinion, this is a violation of the Plaintiff's rights and the question of credibility should be submitted to a jury.").

use of "junior" is combined with the statements by Truscott and Rivera regarding management's desire to hire and retain younger workers over older ones, and the hiring of Blair Brumley, 39, during contemporaneous layoffs, the jury could draw the inference that "junior" indeed indicated the desire for younger employees – a desire that Respondent acted upon. The piecemeal method favors movants and denies plaintiffs the benefits of inferences from the totality of the evidence in derogation of Rule 56. *See Reeves*, 530 U.S. at 150-51.

IV. The Eighth Circuit Held That A Six Year Age Difference Between A Plaintiff And Her Replacement Is Not Sufficient To Permit An Inference Of Age Discrimination

Respondent maintains that the Eighth Circuit did not in fact hold that there could be no inference of age discrimination where the plaintiff's replacement is six years younger. Brf. in Opp. at 26. The argument is contrary to the Court's holding that Wittenburg could not show that her replacement was "substantially younger" since the "disparity between Wittenburg and Roorda is six years." *Wittenburg*, 464 F.3d at 840.[9] Respondent's stance again is contrary to the view of a district court. *Webb v. Potter*, 2007 WL 709016, *18 (W.D. Mo. Mar. 5, 2007), recently cited *Wittenburg* for the proposition that a "six-year age difference [is] not enough" to permit an inference of age discrimination. Petitioner believes that the subjective and arbitrary cut-off prevents the jury from weighing facts in context.

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9. The Circuit found that Wittenburg's duties were assumed by both Roorda (age 45) and Alberts (age 49), *see Wittenburg*, 464 F.3d at 840, when in fact they were assumed only by Roorda (age 45) and *Ramos* (age 40). A91. Alberts, while assigned certain technology related stock coverage, assumed the duties of Kurt Lauber and not Wittenburg. A89.

CONCLUSION

The "vanishing trial" is a matter of national concern especially in civil rights.[10] "[T]he data is incontrovertible that the American jury system is dying. It's dying faster on the federal side than on the state side; it's dying faster in civil cases than in criminal."[11] Employment discrimination leads this trend. *Wittenburg* demonstrates how courts become judges of the law and facts at summary judgment – now the main event in this area of litigation – even applying unsanctioned, arbitrary adjuncts to Rule 56 and evidentiary standards. The decisional law is increasingly uneven. In some circuits, Wittenburg would have had a strong case. In the Eighth Circuit, she did not even get a day in court. The injustice would have been palpable to the Founders who favored juries especially in cases involving the powerful.[12] Petitioner respectfully requests this Court to apply its clarifying authority in order to halt structural damage to the judiciary's vital role in the federal anti-discrimination system.

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10. *See* Seth Rosenthal, *The Jury Snub*, Slate, Dec. 18, 2006 (noting that the problem is "acute" in the Eighth Circuit).

11. Hon. William G Young, Address, 2004 Justice Roundtable, Civil Action Vol. 4, No. 1, page 4 (Spring 2005); Adam Liptak, *Cases Keep Flowing In, But the Jury Pool Is Idle*, N.Y. TIMES, Apr. 30, 2007 (noting scholar Marc Galanter's view of a shift to "a more European way of decision-making by looking at the court file rather than through encounters with living witnesses whose testimony is tested by cross-examination").

12. *See* U.S. CONST. Amend. VII; THE DECLARATION OF INDEPENDENCE, ¶ 20 (U.S. 1776). John Adams inveighed against British enforcement of the Stamp Act in admiralty courts: "No juries have concern there! The law and the fact are both to be decided by the same judge." Leonard W. Levy, *Origins of the Bill of Rights*, 226 (Yale University 1999). Like Respondent, entities benefitting from cloistered paper contests in lieu of public trials often are economically powerful. Title VII requires "fifteen or more employees" and the ADEA requires "twenty or more employees." 42 U.S.C. § 2000e(b); 29 U.S.C. § 630(b).

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